Supreme Court of the United States

OCTOBER TERM, 1966

No. 334

UNITED STATES, PETITIONER

vs.

BILLY JOE WADE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Criminal No. 6805

[File Endorsement Omitted]

UNITED STATES OF AMERICA

vs.

BILLY JOE WADE, THOMAS NORMAN BRIGGS,
and BILLY REX PICKETT

Vio. Ti. 18, U.S.C., Sec. 371
(Not more than $10,000 or not more than 5 years, or both)

INDICTMENT—Filed March 23, 1965

THE GRAND JURY CHARGES:

1. That for a period of time commencing shortly prior to September 16, 1964, and continuing to on or about September 21, 1964, Billy Joe Wade, Thomas Norman Briggs and Billy Rex Pickett, defendants herein, unlawfully, feloniously and knowingly conspired, combined and agreed, and confederated with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Sections 2113(a) (b) (c) (d), that is, the said defendants conspired, combined, agreed and confederated with each other to use dangerous weapons, that is, pistols and such force, violence and intimidation necessary to take from the person and presence of any persons, money, belonging to and in the care, custody, control, management and possession of The First State Bank, Eustace, Texas, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

2. That in the furtherance of said conspiracy and for the purpose of executing and effectuating the objects thereof, the defendants, Billy Joe Wade, Thomas Norman Briggs and Billy Rex Pickett, did commit, among divers other acts, the following overt acts within the Eastern District of Texas:

(a) A few days prior to September 16, 1964, Billy Joe Wade, Thomas Norman Briggs and Billy Rex Pickett, discussed and planned to rob The First State Bank, Eustace, Texas.

(b) On or about September 16, 1964, Billy Joe Wade and Thomas Norman Briggs drove from Mesquite, Texas, to the residence of Billy Rex Pickett, located near Sulphur Springs, Texas, where they joined the said Billy Rex Pickett.

[fol. 2] (c) On or about September 16, 1964, Billy Joe Wade, Thomas Norman Briggs, and Billy Rex Pickett acquired a 1964 model Falcon automobile at Emory, Texas, to be used as a "getaway car" in the robbery of The First State Bank, Eustace, Texas.

(d) On or about September 18, 1964, Billy Rex Pickett notified Thomas Norman Briggs by telephone that he was too well known in the area around Eustace, Texas, and feared that he would be recognized if he entered The First State Bank at Eustace, Texas, or was seen in the area immediately prior to or after the robbery of said The First State Bank, Eustace, Texas.

(e) On or about September 20, 1964, Billy Joe Wade and Thomas Norman Briggs drove from Mesquite, Texas, to Malakoff, Texas, and then on to Eustace, Texas, for the purpose of viewing The First State Bank, Eustace, Texas, and making further plans for the robbery of said bank.

(f) On or about September 21, 1964, Billy Joe Wade and Thomas Norman Briggs drove from Mesquite, Texas, in a 1964 Chevrolet Corvette automobile to a location approximately four (4) miles southeast of Eustace, Texas, where they parked the 1964 model Chevrolet Corvette and entered a 1964 model Falcon automobile, which they then drove to The First State Bank, Eustace, Texas.

COUNT TWO

Vio. Ti.18,U.S.C., Sec. 2113(d)

(Not more than $10,000 or not more than 25 years, or both)

THE GRAND JURY FURTHER CHARGES:

On or about the 21st day of September, 1964, in the Eastern District of Texas, Billy Joe Wade and Thomas Norman Briggs, by force and violence and by intimidation, did take from the person and presence of Lee Gray and Jean Chambers $14,870.00, in money, belonging to and in the care, custody, control, management and possession of The First State Bank, Eustace, Texas, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Billy Joe Wade and Thomas Norman Briggs, in committing the aforesaid acts, did assault Lee Gray and Jean Chambers, and put in jeopardy the lives of the said Lee Gray and Jean Chambers by [fol. 3] the use of a dangerous weapon, that is, a pistol, in violation of Title 18, United States Code, Section 2113 (d).

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ Wm. Wayne Justice
WM. WAYNE JUSTICE
United States Attorney

/s/ H. D. Nicholson
H. D. NICHOLSON
Assistant U. S. Attorney

[fol. 5] Form No. 195

No. ——

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE UNITED STATES OF AMERICA

vs.

BILLY JOE WADE, THOMAS NORMAN BRIGGS,
and BILLY REX PICKETT

INDICTMENT

Vio. Ti.18,U.S.C., Secs.371 2113(d)
Two Counts

A true bill,

.....

Foreman.

Filed in open court this ..... day of .....,
A. D. 19....

.....

Clerk.

Bail, $.....

.....

[fol. 6]

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[File Endorsement Omitted]

[Title Omitted]

ORDER APPOINTING COUNSEL—April 26, 1965

On this the 26th day of April, 1965, Billy Joe Wade, one of the defendants in the above entitled cause, appeared in open court and advised the Court that he did not have an attorney to represent him in this cause, that he was financially unable to employ an attorney and that he desired to have an attorney oppointed to represent him, and the Court finding that the said Billy Joe Wade is financially unable to employ an attorney to represent him in this cause,

It is, therefore, ORDERED, ADJUDGED and DECREED that Weldon G. Holcomb, Esquire, a practicing attorney in Tyler, Texas, be, and he is hereby appointed to represent the defendant, Billy Joe Wade, in the above cause.

ENTERED this 26th day of April, 1965.

/s/ Joe W. Sheehy
United States District Judge

[fol. 6A]

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Criminal Action No. 6805

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BILLY JOE WADE, DEFENDANT

EXCERPTS FROM RECORD OF PROCEEDINGS

AT: TYLER, TEXAS
ON: AUGUST 2-4, and 30, 1965

[fol. 7] JEAN CHAMBERS,

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. NICHOLSON:

Q Will you tell the Jury and the Court your name; please, ma'am?
A Jean Chambers.
THE COURT: What was that name; please, ma'am?
THE WITNESS: Jean Chambers.
THE COURT: Chambers?
THE WITNESS: Yes.

BY MR. NICHOLSON:

Q Where do you reside, Mrs. Chambers?
A In Eustace, Texas.
Q Do you have a family?
A Just my husband and myself.
Q Do you have a job or business?
A I work—I'm cashier at the First State Bank, Eustace.

[fol.8] Q How long have you been a cashier there, Mrs. Chambers?

A Since January the 2nd, 1947.

Q How old are you?

A Thirty-five.

Q You've worked at that bank some time, then; haven't you?

A Yes, sir.

Q Mrs. Chambers, how many people work in the bank?

A Mr. Gray and myself.

Q Who is Mr. Gray?

A He is the Vice-President.

Q Were you working at the Eustace bank in September of 1964?

A Yes, sir.

Q I direct—Directing your attention to Monday, the 21st of September, 1964, did anything unusual occur in the bank on that day?

A Yes, sir, we were robbed.

Q Approximately what time of the morning was it—Or, what time of the day—excuse me—was it you were robbed?

A Between nine-thirty and nine-thirty-five. Some-[fol. 9] where thereabouts.

Q Were you in the bank at that time?

A Yes, sir.

Q Was Mr. Gray in the bank at that time?

A Yes, sir.

Q Were you robbed by one man or more than one man—or one woman or more than one woman? Or, who were you robbed by?

A I only saw one man.

Q All right; and where was this man when you first observed him?

A He was coming through the front door.

Q Let me show you, Mrs. Chambers, what has been marked for identification purposes as Government's Exhibits 8, 9, 10 and 11, and ask you if you can recognize what each of these exhibits are?

REPORTER'S NOTE: Instruments were then handed to the witness.

(pause)

A Yes, sir.
Q What are these pictures of?
A The outside and inside of our bank.
Q Do these pictures accurately and truly portray the bank as it was on the day that you were robbed?
A Yes, sir.
[fol. 10] MR. NICHOLSON: Judge, we will offer these Government exhibits.
MR. HOLCOMB: No objection, Your Honor. I've already looked at them.
THE COURT: All right; you may pass them to the jury.

REPORTER'S NOTE: Instruments were then handed to the jury.

BY MR. NICHOLSON:

Q Looking to Government's Exhibit 10, where were you standing in regard—in regard to this picture when you first observed this man come through the front door?

REPORTER'S NOTE: An instrument was then displayed before the witness.

A Right here at the north end (indicating). There is a typewriter right—right behind this—this part here.
Q Right there (indicating)?

REPORTER'S NOTE: There was no audible response from the witness.

Q What is this right here (indicating)?
A That's the front of the counter.
THE COURT: A little louder, please, Mrs. Chambers.
[fol.11] A (repeating) The front of the counter.

BY MR. NICHOLSON:

Q And you were--
If we were looking into the picture, you were at the far end of the counter. Is that correct?
A Yes.
Q And what is this right here (indicating)?
A A swinging door.
Q That's the way you make access or entrance into the interior behind the bank?

A Yes.
Q The bar of the bank?
A Yes.
Q What does Government's Exhibit No. 8 portray?

REPORTER'S NOTE: An instrument was then handed to the witness.

A It's our vault door.
Q All right.
And is Government's Exhibit No. 8 the picture of—the picture of the vault door—is it also visible in Government's Exhibit No. 10?

REPORTER'S NOTE: An instrument was then handed to the witness.

A Yes.
Q Is it the door immediately in the center of the back [fol. 11] wall there (indicating)?
A Yes.
Q Government's Exhibit No. 9—the—it shows some doors. Are those the front doors of the bank?

REPORTER'S NOTE: An instrument was then displayed before the witness.

A Yes.
Q Is this the door that you referred to that you saw the man walking through?
A Yes.
Q Government's Exhibit No. 11:

REPORTER'S NOTE: An instrument was then displayed before the witness.

Q (continuing) If you—If you—
Can you tell approximately where that picture was taken from?
A Well, I would say it was directly in front of the bank.
Q What lies directly in front of the bank?
A Well—
Q (interrupting) By that, I mean is it an open field—a vacant lot?

A Yes.
Q Is it a square?
A No; it's an open—it's open right there—across from [fol. 12] the front of it.
Q In regard to Government's Exhibit No. 11, is there a Post Office in Eustace, Texas?
A Yes, sir, it's the second door from the bank.
Q And as—if you came out of the bank through the front door, which way would you turn to go to the Post Office?
A To the right.
Q All right.
Mrs. Chambers, I believe you testified that you were standing at the rear of the counter, back by the typing machine in close to the swinging doors. Is that correct?
A Yes.
Q When this man came through the front door?
A Yes.
Q Did the man—
What—Just tell what he did when he came through the front door.
A Well, he said he wanted to cash a check.
Q Where was he when he told you that he wanted to cash a check?
A Just as he entered the door.
Q What did you say to him at that time?
A I said, "Okay; let's see it." And he was coming [fol. 13] toward me then.
Q Did he come on back to you?
A You mean to—
I don't understand.
Q What did he do after you said, "Let's see it."?
A Oh, he was coming towards me all the time.
Q He never stopped walking?
A No.
Q He just continued to approach you?

(pause)

REPORTER'S NOTE: There was no audible response from the witness.

Q Did he do anything when you said, "Let's see it."?

A Well, the next time I looked up, I—I looked down—and the next time I looked up, well, he had taken a gun—or he had a gun in his hand.

Q Where was he standing when you—or—where was he when you noticed that he had a gun in his hand?

A He was about ten feet from me.

Q Do you recall what type of a gun it was that he had?

A Well, it was a nickle—silver nickle—or nickle plated gun.

Q I show you what has been marked as Government's [fol. 14] Exhibit 1 and ask you if—if that—

REPORTER'S NOTE: An object was then displayed before the witness.

Q (continuing)—does that look similar to the gun the man had?

A Yes, sir.

Q Do you recall which hand he was holding this gun in?

A In his right hand.

Q Do you recall anything unusual about the—the appearance of the man?

A Yes, sir; he had tape on his face.

Q Where was this tape on his face, Mrs. Chambers?

A Right along here (indicating). Right along here.

Q Did he have any—

Can you describe his clothing in any manner?

A Well, he had a grey—had grey khaki pants on and a long-sleeve sport shirt on—and a straw hat.

Q And the tape on his—

A (interrupting) Yes.

Q (continuing)—jaw?

After you noticed the gun what did he do then?

A Well, he came behind the swinging door into the bookkeeping department where I was.

[fol. 15] Q He came on into the—

How close was he to you then, or did—

Did he say anything to you when he went through those swinging doors?

A Yes.
He told me to move back—twice.
Q And did you move back?
A Yes.
Q How close did he approach you? Did—Did he—Did you stop, then, when you moved back?
A Yes, sir.
Q Did he—
How close did he come to you before he stopped?
A Well, he came right to me.
Q As close as from me to that rail (indicating)?
A Yes, sir; closer than that—when he got in front of me.
Q Was he holding the gun on you at that time?
A Yes, sir; he had it in his hand.
Q Do you see the man in this courtroom, Mrs. Chambers, that robbed you that morning?
A Yes, sir.
Q Would you point him out; please?
A Yes, sir.

REPORTER'S NOTE: The witness indicated by [fol. 16] a motion with her hand in the general direction of the Defendant.

Q Are you making reference to the second gentleman seated here at the table (indicating)?
A Yes; in the blue suit.
MR. NICHOLSON: Your Honor, may the record reflect that this witness has identified this Defendant as the man who held the gun on her?
THE COURT: The record may so reflect.

BY MR. NICHOLSON:

Q Mrs. Chambers, when the man was holding—standing there holding the gun on you, did he say anything to you at that time?
A Yes, sir. He gave me a pastel-striped pillow case and told me to go back there and get my money.
Q Where was Mr. Gray at the time that this man come into the bank?
A He was in the vault getting some papers for the day.

Q Had you just opened up the bank shortly before that time?

A We opened at nine.

Q Mrs. Chambers, when you were looking down the barrel of that gun, and he handed you the pillow case and said, "Get me your money.", were you in fear of your [fol. 17] life or serious bodily injury?

A Yes, sir.

Q You were afraid, then?

A Yes, sir.

Q What did you do after he handed you this pillow slip and told you to get your money?

A I took it and went to the vault.

Q Did you say anything to him or to anyone before you went to the vault?

A No, sir.

Q You started to the vault, then, with the pillow case?

A Yes, sir.

Q Did you—

What did this man do when you started to the vault with that pillow case?

A He walked behind me and stood in front of the door of the vault.

Q Was Mr. Gray in the vault when you went into the vault?

A Yes, sir.

Q Did you say anything to Mr. Gray when you walked into the vault?

A I told him that we were being robbed.

Q Did Mr.—

[fol. 18] What did Mr. Gray say, or what did he do, when you told him, "We are being robbed."?

A Well, he turned to me—and we just both went to the safe. It was right at the side of where he was getting the papers. And we both just got down to get the money from the safe.

Q Where was Mr. Wade standing when you told Mr. Gray that you were being robbed?

A In front of the vault door.

Q Was he visible to yourself and Mr. Gray?

A Yes, sir.

Q Did he still have the gun trained on you and at that time Mr. Gray also?

A Yes, sir.

Q I believe you testified that you and Mr. Gray both started dumping money into this sack?

A That's correct.

Q That he had.

After you—

Did you take all the money that you had there?

A Yes, sir.

Q And put it in the sack?

A Yes, sir.

Q After the sack was filled what happened then?

A Well, we both started from the vault—and he told [fol. 19] me to stay in the vault.

Q You are talking about "he". Are you talking about Billy Wade here (indicating) told you to stay in the vault?

A Yes, sir.

Q Did he say anything to Mr. Gray?

A He told him he wanted the money from the—up front.

Q Did he ever make any threat or any caution to Mr. Gray?

A Yes, sir; he told him if he'd do what he told him to do no one would get hurt.

Q Well, did Mr. Gray do what he told him?

A I believe he did.

Q You say you started out of the vault and he told you to get back into the vault?

A Yes, sir.

Q Did Mr. Gray go on out of the vault?

A Yes, sir.

Q What did this man with the gun do when Mr. Gray stepped out of the vault?

A He held the gun on him. He just backed to the side and he held the gun on him while he went to the front.

Q Now, you say "while he went to the front"—

[fol. 20] A (interrupting) Mr. Gray went to the front.

Q Who—

A (interrupting) Mr. Gray went to the teller's cage to get—up in the front—to get the money.

Q Well, Mr. Gray—what did he—

Well, did he dump any money into the sack from the teller's cage?

A Yes, sir; from the teller's drawer.

Q Did he take money from any other places located in the bank?

A Yes, sir; out of the drawer.

Q Did he—

MR. NICHOLSON: Excuse me.

A (continuing) We had some money on top—and then we had some in the drawer—and he took it from both places.

Q Did this man take all the currency, or did he take any silver?

A No, sir; currency.

Q Solely currency?

A Uh-huh.

Q After the money had been put into the sack, or the pillow slip, all that you had, I presume—what if anything did this man tell—

Did this man—

[fol. 21] MR. HOLCOMB: (interrupting) Your Honor, I'm going to object to Counsel's statement there.

THE COURT: Yes; your statement "all you had, I presume" was highly improper—and it is being stricken from the record and will not be considered by the jury for any purpose.

Now, just ask the questions and don't make observations.

MR. NICHOLSON: Yes, Your Honor.

BY MR. NICHOLSON:

Q After this man had left the bank did you have any currency left in the bank?

A No sir.

Q Mr. Chambers, after the money that was put into the sack was put into it, did this man make any statement to either you or to Mr. Gray, or to both of you?

A He told Mr. Gray to go back into the vault and shut the door.

Q Where were you when he told Mr. Gray that?

A I was in the vault. He had told me again to stay in the vault.

Q Did Mr. Gray come back into the vault?

A Yes, sir.

Q Did Mr. Gray close the door behind him like this [fol. 22] man told him?

A Yes, sir.

Q Did you ever at any time during the course of this entire transaction—did you ever see this man touch anything in that bank?

A Yes, sir; he opened four drawers behind our tellers' cages.

Q Are these pull-type drawers?

A Yes, sir.

Q That you pull out?

A Yes, sir.

Q After—

Where was this man standing when the door to the vault was closed?

A To our right.

Q Did you ever see this man again that morning?

A No, sir.

Q How long did you and Mr. Gray stay in the vault?

A Well, a minute—or somewhere thereabouts.

Q What prompted you to come out of the vault?

A When the door opened and closes, well, we—you can hear pressure. And we heard that pressure go off.

Q When you speak of the door opening and closing [fol. 23] are you making reference to the door of the vault or the front door to the bank?

A The front door.

Q Did you at any time see an automobile parked in front of the bank?

A No, sir.

Q You don't know, then, what this man did after he told you to close the vault door?

A No, sir.

Q After the robbery had occurred did you go out onto the street?

A Yes, sir.

Q Approximately how long was it afterwards that you had gone out onto the street?

A Well, maybe three or four minutes.

Q Did you see anyone there that you knew?

A Yes.

Q Who did you see?

A Mrs. Balfa Ballard.

Q Did you have any conversation with Mrs. Ballard?

A Yes. I—

MR. NICHOLSON: (interrupting)—Don't go into what she said, now.

Q But, you did have a conversation with her. Is that [fol. 24] correct?

A Yes.

Q Was this—

Where was Mr. Gray when you went out onto the street?

A At the phone.

Q Well, what did he do at the phone?

A He called the Sheriff.

MR. HOLCOMB: Now, Your Honor, we are going to object to what somebody else did with regard to this in the absence of the Defendant.

THE COURT: Overrule your objection.

She can't testify as to what was said when he called the Sheriff.

BY MR. NICHOLSON:

Q Did you see Mr. Gray pick up the telephone and call?

A Yes.

Q And who was he calling?

A The Sheriff's Department.

Q All right.

Subsequent to the call that he made to the Sheriff's Department did any officers come to your bank?

A Yes.

Q Who arrived there first, ma'am?

[fol. 25] A J. W. Brownlow (phonetic).

Q Who is he?

A The Sheriff of Henderson County.

Q Did other officers arrive, then, after he came?

A Yes.

Q Did members of the F.B.I. come to the bank at that time?

A Yes.

Q Mrs. Chambers, where is Eustace, Texas, located—in what county?

A Henderson.

Q How much money was taken from the bank at the time of this robbery?

A Fourteen thousand, eight hundred and seventy dollars.

Q Was an audit run to determine how much had been taken?

A Yes, sir.

Q Who ran that audit?

A Mr. Gray.

Q Did you have anything to do with the audit?

A Yes, sir; I rechecked it.

Q Were his figures correct?

A Yes.

[fol. 26] Q The money that was taken in this robbery, Mrs. Chambers—was this bank money? By that, I mean were these funds that were in the custody and control of the bank—in you-all's possession?

A Yes, sir.

Q Mrs. Chambers, when Wade here was in your bank did you notice him do anything that would indicate to you that he was nervous or excited?

MR. HOLCOMB: Your Honor, we are going to object to that. We have no objection to her testifying as to what he did.

THE COURT: Yes; she can testify as to what he did or what she saw.

MR. NICHOLSON: Your Honor, that was the purpose of my question.

THE COURT: I know, buy you are reaching the conclusion yourself. Let her testify as to how he acted.

BY MR. NICHOLSON:

Q Did he—Did he make any gesture or any movement that would—that would indicate to you whether or not he was nervous or calm?

THE COURT: That's exactly what I sustained the objection to. Just let her testify without your trying to [fol. 27] say what your conclusions are—but just let her testify what his actions were. Just let her testify as to how—what his actions were.

BY MR. NICHOLSON:

Q Can you answer this question, then? What was his demeanor or actions in that bank?

A Well he appared to be calm until he came—He appared to be calm when he came in. And along about the latter part, he was nervous.

MR. NICHOLSON: We have nothing further from this witness, Judge.

MR. HOLCOMB: Just a minute, Your Honor.

(pause)

CROSS-EXAMINATION

BY MR. HOLCOMB:

Q Mrs. Chambers, had you ever seen the man who robbed you on the 21st of September, 1964, before the date of the robbery that you know of?

A No, sir.

Q When was the next time that you saw anyone who was supposed to be the man who robbed you, ma'am?—about what date?

(pause)

[fol. 28] A I don't remember the day we came.

Q Wasn't it about May the 10th, 1965—of this year—ma'am?

A I just don't remember.

Q Was it during 1965?

(pause)

A Yes.

Q Prior to the time that you saw this man that was supposed to have been the person who robbed you, Mrs. Chambers, had you been shown any pictures by any officers or any officials—pictures purporting to be the man who robbed you over there at Eustace, ma'am?

A No.

Q During the investigation of the bank robbery no pictures or mug shots—

A (interrupting) Yes, sir.

Q (continuing) —were shown to you?

A Yes, sir.

Q All right.

And by whom were they shown to you, if you recall?

A Well, various law officers.

Q All right; were any of those officers F.B.I. agents?

A Yes, sir.

[fol. 29] Q All right; approximately how many pictures were shown to you?

A Well, quite a few.

Q All right.

During this period of time, Mrs. Chambers, when these pictures were shown to you, there were several pictures which you informed the officers that could be, but you werent' sure. Isn't that correct?—that they looked like the man?

A No, sir.

Q You did not tell any officer that any of the pictures shown to you—

A (interrupting) One.

Q (continuing) —could be the man who robbed you —until you saw Mr. Wade here under the custody of officers—of Officer Albert—at the Smith County Jail. Is that correct?

A No, sir.

We—I picked his picture from the file.

Q All right.

You say "out of the file". How many pictures were shown to you?

A About eight or nine that day.

Q All right; that day.

Where were those pictures taken, ma'am? Do you

[fol. 30] know?

A Yes, sir; the first one that we saw was one—well, let's see. There was one that—

I don't know where that one was taken.

Q All right.

A And the other one was the one that was photographed in the Dallas County Jail.

Q All right; Dallas County Jail?

A Uh-huh.

Q All right.

A It had that writing on it.

Q It had the writing on it. It said "Billy Joe Wade". Is that correct?

A Well, I just remember that it had "Dallas County" on it.

Q All right.

And was there any writing on the back of this picture?

A We didn't see that.

Q You didn't see that?

A No.

Q The officers didn't let you see that?

A No, sir.

Q They didn't tell you his name was Billy Joe Wade or anything like that?

[fol. 31] A No, sir.

Q Did they tell you—

A (interrupting) Not at that time.

Q They didn't tell you who it was or anything like that. Is that correct?

A That's right.

Q All right.

Do you recall the other pictures that were shown to you on that date?

A I don't understand your question.

Q Do you recall the identity of any of the other persons who were shown to you—whose pictures were shown to you on that date?

A No, sir.

Q Were you shown a picture of Norman Thomas Briggs?

A No, sir.

Q Were you shown a picture of a man by the name of Pickett?

A No, sir.

Q Mrs. Chambers, you cannot give us the approimate date of the time that Officer Albert requested—or brought you and Mr. Gray over to the Smith County Jail—this year?

A The time?

[fol. 32] Q The date and the time; yes, ma'am.

(pause)

A Well, it was in the afternoon.

Q All right.

And if the record reflects that it was about May the 10th, 1965, then that would be the first time that you had seen the person whom you say robbed you over at Eustace on September the 21st, 1964. Is that correct?

A Except when he was in the bank.

Q That's what I mean; since the robbery.

A Yes.

Q Since the robbery.

I believe you stated that you had never seen the person who robbed you except on that date—

A (interrupting) Yes.

Q (continuing). —prior to that time.

All right.

Now, I direct your attention to what transpired over at the Smith County Courthouse and Jail.

Is it correct that you and Mr. Gray were taken to the courtroom and sat out on the benches? Is that correct?

A Yes.

Q And that shortly thereafter the F.B.I.—or—F.B.I.

[fol. 33] Agent Albert—brought this Defendant (indicating)—Billy Joe Wade—in his custody—to the anteroom there in the back. Isn't that correct?

(pause)

REPORTER'S NOTE: There was no audible response from the witness.

Q (continuing) The door was open, and you and Mr. Gray were sitting on either the first or second row of benches. Isn't that correct?

(pause)

A Yes.

Q All right.

And this was the only prisoner that—that Mr. Albert, the F.B.I. agent, had.

And shortly thereafter—approximately fifteen minutes later—a deputy sheriff, or another officer, brought three or four other prisoners down. Isn't that correct?

A No, sir; there was more than that.

Q More than that.

All right; five or six?

A Yes.

Q All right.

And the Deputy Sheriff brought down five or six, and Mr. Albert had brought down this Federal prisoner. [fol. 34] Isn't that correct?

A Well, I don't know about that.

Q All right.

But, you saw Mr. Albert with this man; and then at a later time the Deputy Sheriff and the other officer brought down several other prisoners. Isn't that correct?

A Well, I don't know. He was—They were both in the hall.

Q All right; Mr. Albert and Billy Joe Wade were. Correct?

A No; Mr. Albert was in a room.

Q With whom?

A There wasn't anyone in there. This—This boy was standing in the hall.

Q All right; by himself?

A Yes.

Q No custody; no guard?

A I don't know.

Q No officers around at all?

A We don't know—I don't know.

Q You don't know.

You didn't see anyone else?

A No.

Q And was Mr. Albert where he could see this [fol. 35] man?

A Yes.

Q All right.

And he was the only other person there at that time. Is that correct? —Mr. Albert, and this prisoner, and then you folks that walked in the hall?

A No; we were sitting in the doorway. It was opened —and we looked up.

MR. HOLCOMB: Thank you, ma'am.

One moment, Your Honor.

(pause)

Q All right; thereafter some other prisoners were brought in and what they call a "line-up" was had. Is that correct?

A Yes, sir.

Q All right.

And at that time the man who you say is Mr. Wade here (indicating), who had been standing out in the hall, was placed in this line-up with this other group of people—and Mr. Albert asked them some questions, to step forward, and so forth—and you identified this man here (indicating). Is that correct?

A Yes.

Q And—

All right; and then shortly thereafter—Did Mr. Albert [fol. 36] take any pictures at that time?

A Yes.

Q All right.

Then, shortly thereafter, during this—here on this same occasion, Mr. Albert placed some tape or caused to have some tape placed upon the face of Mr. Wade. Is that correct?

A No; they had tape on them when they came in.

Q Whenever you saw Mr. Wade out in the hall, he had no tape on; did he?

A I don't recall.

Q You don't recall?

A No, sir.

Q But you saw him out there in the hall when he—and he was the man that—

A (interrupting) Just a glance was all.

Q All right.

And each one of the men in the line-up had tape on their face. Is that correct?

A Yes; the best I recall.

Q Ma'am?

A Yes.

Q And at that time, that was the first time that you had seen the man that you say robbed you—which you say was Mr. Wade here (indicating)—since September [fol. 37] the 21st, 1964. Is that correct?

A Yes, sir.

Q Was I present at that line-up, ma'am?

A No.

Q Was any lawyer representing Mr. Wade present there as far as you know?

A No.

MR. HOLCOMB: All right; no further questions. Thank you, Mrs. Chambers.

THE COURT: Is that all from Mrs. Chambers?

MR. NICHOLSON: I believe that's all, Judge.

THE COURT: You may step down.

MR. NICHOLSON: Thank you, Mrs. Chambers. Judge, that bank is closed up—and if she can go back they can open it this afternoon for this afternoon's business.

THE COURT: Any objection?

MR. HOLCOMB: Judge, I have no objection.

THE COURT: All right, you can go back to Eustace and disburse the funds, then.

All right; call your next witness.

MR. NICHOLSON: Judge, the Government would call Mr. Lee Gray.

THE COURT: All right, call Mr. Lee Gray.

[fol. 38] LEE GRAY

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. NICHOLSON:

Q Will you state your name for the Judge and the Jury; please, sir?
A Lee Gray.
Q Mr. Gray, how old a man are you?
A Sixty-four.
Q Where do you live?
A My home is in Mabank, Texas.
Q Do you work anywhere?
A I work in the First State Bank in Eustace.
Q How long have you been employed by the First State Bank over at Eustace, Mr. Gray?
A Twenty-one years.
Q Were you employed as the—
What—What position do you hold over there at the bank?
[fol. 39] A Vice-President.
Q Do you actually run the bank, sir?
A I guess you would say that; yes.
Q Does Mrs. Chambers work with you?
A Yes, sir.
Q What position does she hold?
A Cashier.
Q Anybody else work in that bank besides you two?
A No; not—Just us two—all the time.
Q Mr. Gray, where is your bank located? Is it in Smith County or is it—What county is it in?
A Henderson County.
Q Henderson County.
Is your bank chartered by the State of Texas and does it operate under the banking laws of the State of Texas?
A It does.
MR. HOLCOMB: Judge, to save time, we will stipulate that it's a chartered and regularly operated bank in Texas.
THE COURT: All right.
MR. NICHOLSON: We might ask Counsel one thing here. Will you stipulate—
MR. HOLCOMB: (interrupting) We will stipulate

[fol. 40] as to the F.D.I.C. too. If the man says it's F.D.I.C., we'll—

BY MR. NICHOLSON:

Q (interrupting) Mr. Gray, are the funds of your bank insured by the—any agency of the Federal Government?

A Federal Deposit Insurance Corporation.

MR. HOLCOMB: We'll stipulate to those two items, then, Your Honor, to save time.

THE COURT: All right; the funds of the bank, then, were so insured by the Federal Deposit Insurance Corporation as of September the 16th, 1964—or as of September the 21st, 1964.

MR. NICHOLSON: Thank you.

THE COURT: Is it so stipulated?

MR. HOLCOMB: Yes, Your Honor.

THE COURT: All right.

BY MR. NICHOLSON:

Q Mr. Gray, directing your attention back to the date of September the 21st of 1964, Monday morning: I will ask you if anything unusual occurred at the bank.

A Well, there was a gentlemen stepped into the bank and relieved us of what cash we had on hand.

Q Mr. Gray, where were you when you first saw the [fol. 41] man that relieved you of your cash?

A I was inside the vault.

Q When did—

Where was this man standing, or where was he located, when you first saw him?

A Well, when I first saw him, he was about, oh, I imagine ten feet away from the vault door—out in the building.

Q Where was Mrs. Chambers when you first saw this man—excuse me—when you first saw a man?

A Where was Mrs. Chambers?

Q Yes, sir.

A Well, she had come into the vault.

Q Did Mrs. Chambers make any statement to you when she came into the vault?

A She said, "Mr. Gray, we are being robbed."

Q What did you do when she told you you were being robbed?

A I beg your pardon; I didn't—

Q What did you do when she told you that you-all were being robbed?

A Well, she gave me this pillow case that she had in her hand and said, "He told us he wanted us to put the money in there."—in that bag.

Q When you looked up, and saw the man about ten [fol. 42] feet from you in the bank there was he holding anything or carrying anything?

A Yes; he had a gun.

Q What kind of gun did he have, Mr. Gray?

A A pistol.

Q Did you get a good look at that gun?

A Only looking right straight at the barrel.

Q Do you recall whether it was a pistol, a revolver—blue, silver, or what type of gun it was?

A It was nickel-plated.

Q I will show you what has been marked and introduced into evidence as Government's Exhibit No. 1—

REPORTER'S NOTE: An object was then displayed before the witness.

Q (continuing) —and ask you if that looks like—does that look like the gun?

A It does.

Q I believed you testified that Mrs. Chambers had a sack in her hand, or a—when she came into the vault. Is that correct, sir?

A That's right.

Q What did you and Mrs. Chambers do with that sack?

A We put what money was in the safe inside it.

[fol. 43] Q And you had put the money in the safe in the—After you had put the money in the safe in the sack, what then occurred?

A Well, I walked out into the other part of the building—out of the vault.

Q Yes.

Did—Did Mrs. Chambers follow you out of the vault?

A Well, sir; I think she started—and he—he told her to not come out.

Q What did he do when you walked out of the vault door?

A He just made the remarks—he said, "Mr. Gray, do what I tell you and you won't get hurt."

Q Well, did you do what he told you?

A I did.

Q What did he tell you to do then?

A Then he told me to come to the drawers where we had the other money—and on the shelves—and he said, "Put the rest of it in here too."

Q Did you put the rest of the money in there?

A I did.

Q Did you put all of the currency—

Excuse me, did you put currency and silver into the sack?

[fol. 44] A No, sir; no silver. It was just currency.

Q Did you put all the currency that you had in the bank in there?

A All we had. All we had.

Q Mr. Gray, how close was this man to you with that gun?

A It was just about to this gentleman sitting right there (indicating).

Q Did the man have the gun trained on you?

A He did.

Q When you were looking down the barrel of that gun were you in fear of your life or serious bodily injury if you didn't do what he told you?

A I was; yes.

Q Mr. Gray, do you see the man in this courtroom that held the gun on you?

A Yes.

Q Will you point him out for the jury?

A Sitting behind the attorney over there.

Q You are making reference to the man in the blue or black suit here (indicating)—behind Counsel?

A That's right.

Q Mr. Gray, is there anything different about this man today than it was when you were looking at him in the bank, that day?

[fol. 45] A Well, he's dressed differently—and he don't have those patches on his cheeks—tape.

Q Can you describe for the jury the patches or tapes on his cheeks that he had on the day that he was in your bank?

A Well, on either cheek (indicating) was a small piece of tape—right across in this direction (indicating) —from one side to the other.

Q All right, sir.

After you had put all of your cash into the sack did this man tell you to do anything?

A He told me to go inside the vault and close the door.

Q Did you do that?

A Yes; I did.

Q Where was this man standing—

Where was he the last time you saw him?

A Well, when I started into the vault, I had my back to him. He was still out in the building, between the vault and the counter—and when I went in, my back to him. I pulled the door to behind me; and that is the last I saw him.

Q Did—Did you run an audit yourself to determine how much money had been taken in this robbery?

A Yes; I did.

[fol. 46] Q How much money was taken, Mr. Gray?

A Fourteen thousand, eight hundred and seventy dollars.

Q You yourself ran that audit?

A I did.

Q And you—

Have you seen this man since the time that he was in your bank?

A Well, we were called down here one time. I don't remember exactly the date, to a line-up.

Q How many men were in that line-up, Mr. Gray?

(pause)

REPORTER'S NOTE: There was no audible response.

Q (continuing) Was there—
A (interrupting) I believe there were five.
Q Did you see this man in the line-up?
A I did.
Q Did all the men in the line-up have tape on their faces?
A Yes.
Q Were they all dressed alike other than tape on their faces?
A No; I don't think so.
Q When this man was in your bank did he have any [fol. 47] type cover on his head?
A He had a broad-brim straw hat.
Q Do you recall what kind of clothes he had on?
A Well, I think he had on grey khaki trousers and a long-sleeve sport shirt.
Q When the officers came to your bank on the day it was robbed, and the days thereafter, did they exhibit to you some pictures of people?
A I don't know whether they did that day or not. They did from time to time.
Q Can you give the jury the best estimate that you could make as to how many pictures you looked at?
A Oh, no; I—I couldn't make an estimate of how many we looked at. Several of them.
MR. NICHOLSON: We have nothing further of this witness, Judge.

CROSS-EXAMINATION

BY MR. HOLCOMB:

Q Mr. Gray, as far as you know had you ever seen the man that robbed the bank over there prior to September the 21st, 1964?
A Not that I know of; no.
[fol. 48] Q All right, sir.
And if I may ask, sir, when was the next time that you saw anyone who was either informed to you to be the man who robbed you or intimated to be the man who

robbed you, or was identified by you as the man who robbed you? When was—When was the next time that you saw such a person?

A When we came down here.

Q All right, sir.

A For the—

Q (interrupting) Could you give us your best judgment of about when it was you came to—

Was it here in Tyler, Texas, you came to?

A It was in Tyler; yes.

Q All right, can you give us in your best judgment about what day of this year it was that you were asked to come over?

A No; I wouldn't attempt to say exactly what day it was.

Q All right, sir.

If the record shows it was about May the 10th, 1965, was that the only time that you came over to such a line-up as you mentioned?

A Just only the one time; that's all.

Q One time?

[fol. 49] A That's all.

Q All right, sir.

Now, did this happen over here in the Smith County Courthouse—this line-up, Mr. Gray?

A Yes, sir.

Q Now, Mr. Gray, whenever you went to the courthouse—

You know where the courtrooms are over there; do you not?

A Well, that's the first time I'd—I was ever in there.

Q All right, sir.

Now, before you went into the courtroom, did you see anyone in the custody of Mr.—

Do you know Mr. Kenneth Albert of the F.B.I.?

A Yes.

Q Is that the gentleman sitting across here (indicating)?

A That's him.

Q Prior to the time you went into the courtroom on that date did you see Mr. Albert with this man in his custody—out in the hall?

A Out in the hall?
Q Yes.
A Well, I don't know whether I saw him personally—
[fol. 50] but I saw someone out in the hall with Mr. Albert.
Q You saw—
A (interrupting) I don't know whether—
Q (interrupting) Pardon me.
You saw Mr. Albert and one prisoner. Is that correct?
A Well, that's what I said; I don't—I don't—I couldn't recall whether I saw anyone else—
Q (interrupting) All right.
A (continuing)—with him or not.
Q All right.
But, you did see someone in the hall besides Mr. Albert. Is that correct?
A Yes, sir; that's right.
Q All right, sir.
And at that time was there anyone else around the courtroom or anything for this line-up, and so forth, except this person who was with Mr. Albert—and yourself and Mrs. Gray—or yourself and Mrs. Chambers?
A Now, I didn't get that question exactly.
Q About the time of this line-up, or just before the line-up, out here in the hall—
A (interrupting) Uh-huh.
Q (continuing)—whenever you saw Mr. Albert—
[fol. 51] Did you shake hands with him?
A No; not at—
Q (interrupting) Did he speak to you?

(pause)

A Well, I think we had seen him before—before he—they—the others came in.
Q All right, sir.
And this man was with Mr. Albert before the others came in with some other officers?
A I mean, I—we spoke to Mr. Albert before the rest of the men that they had in the line-up came in.
Q All right, sir.

And the only one there with Mr. Albert—he just had one prisoner at that time before the others came down. Isn't that correct, sir?

A No; not at the time I spoke to Mr. Albert.

Q At the time you spoke to Mr. Albert where was it?

A Well, I don't—I don't—I can't say exactly.

Q Let's get back to the hallway, Mr. Gray, and let me get straightened out here.

I believe you told us that you saw Mr. Albert and someone with Mr. Albert, whom you didn't identify or don't recall who it was with Mr. Albert, in the hall as you and [fol. 52] Mrs. Chambers came on in to go to the courtroom. Is that correct?

A No; we saw him—while we were in the courtroom they opened the door, and we saw them from there.

Q All right, sir.

In other words, you had already got into the courtroom and were sitting on the first or second row there, and the door was opened and you saw Mr. Albert and someone in the room with him?

A In the hall.

Q All right; in the hall with him?

A Yes; that's correct.

Q All right, sir.

And you—do you recall how this person with him was dressed?

A No.

Q All right; do you recall anything about what he looked like or anything like that?

(pause)

A Well, we—he resembled the person that we identified as the one that had entered the bank.

Q All right, sir.

And then shortly thereafter some other officers who you may or may not know—I don't know, Mr. Gray—brought some other prisoners or some other people down there—[fol. 53] and that's when you had the line-up. Is that correct, sir?

A That's right.

Q But my point is this, Mr. Gray: before these other folks were brought down there, or came down there, Mr. Albert and the person with him, which you said resembled the Defendant and resembled the man who robbed the bank over there, were the only two people that you could look through from out there and see. Isn't that correct, sir?

A That's right.

Q And you certainly knew that Mr. Albert wasn't a suspect; didn't you?

A Yes.

Q Thereafter, Mr. Gray, in the line-up, you identified this same man who was there in the hallway with Mr. Albert as being the man who robbed the bank. Is that correct?

A Yes.

Q And that was the first time that you had seen this individual, or the person that you identified as the one robbing the bank, since September the 21st, 1964. Is that correct, sir?

A That's correct.

Q Mr. Gray, was I present at the time of this line-up over there?

[fol. 54] A I don't know whether you were or not.

Q All right; do you think you would recognize me if you had seen me before?

A Well, I think I would now—after seeing you.

Q All right, sir.

A But—

Q (interrupting) All right, sir; was anyone over there acting as a lawyer or anything like that for Mr. Wade?

A No.

Q All right, sir.

Am I correct in stating that, sir, the only folks present where you, and Mrs. Chambers of the bank, Mr. Albert, another officer or two, and these people who stood in the line-up?

A That's correct.

MR. HOLCOMB: Thank you very much, Mr. Gray.

REDIRECT EXAMINATION

BY MR. NICHOLSON:

Q Mr. Gray, Counsel here has asked you if you thought you could remember him. If he had held a gun on you and robbed you, do you think you would be able to re-
[fol. 55] member his face some time later?

A I think so; yes.

Q Is there any doubt in your mind but what this man here (indicating) is the one that robbed you?

A No.

MR. NICHOLSON: No further questions.

MR. HOLCOMB: Nothing further.

THE COURT: All right, step down, Mr. Gray.

Do you want Mr. Gray finally excused so he can go open up the bank?

MR. NICHOLSON: Yes.

MR. HOLCOMB: We have no objection, Your Honor.

THE COURT: All right, Mr. Gray, you can go. You are finally excused.

MR. HOLCOMB: Thank you, sir.

THE WITNESS: Thank you.

THE COURT: All right, who will the Government have next?

MR. NICHOLSON: May I have just a minute, Judge?

(pause)

Your Honor, Ladies and Gentlemen of the Jury, at this time the Government rests its case-in-chief.

[fol. 56] THE COURT: All right, what says the Defendant?

MR. HOLCOMB: We would like to call Officer Albert to the stand; please, sir.

THE COURT: All right; come around, Mr. Albert.

Were you sworn yesterday?

MR. ALBERT: Yes.

THE COURT: In this case?

CLERK OF THE COURT: Yes.

KENNETH ALBERT,

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. HOLCOMB:

Q You are Kenneth Albert, Acting Special Agent of the F.B.I., stationed here in Tyler. Is that correct, sir?

A Yes, sir.

Q Mr. Albert, do your records reflect the date of the [fol. 57] line-up which was just discussed and testified to by Mr. Gray?

A Yes, sir.

Q What was that date, sir?

A May the 12th, 1965.

Q All right, sir.

Was I, Weldon Holcomb, the attorney appointed by the Court, notified of such action by the F.B.I. prior to the line-up?

A No, sir; you had not been appointed at that time.

MR. HOLCOMB: Would you please mark this for identification as Defendant's Exhibit No. 1.

(*LETTER*—(a copy)—dated April 26, 1965, addressed to Honorable Weldon G. Holcomb, signed by Joe W. Sheehy, United States District Court, Eastern District of Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 1)

Q Officer Albert, I hand you here what has been marked for identification as Defendant's Exhibit No. 1—and would you tell us what it is, sir?

REPORTER'S NOTE: An instrument was then handed to the witness.

[fol. 58] (pause)

A It's a Court order appointing you to represent Billy Joe Wade.

Q In what cause number, sir?
A 6805.
Q And that is the cause on trial at this time?
A Yes, sir.
Q What is the date of that letter, sir?
A April 26, 1965.
Q April 26, 1965?
A Yes.
Q And by whom is it signed?
A Judge Sheehy.
Q And does it reflect on the fact of it to whom copies of that letter were sent?
A Yes, sir.
Q Who are they, sir?
A Mr. Nicholson and Mr. Reynolds. Mr. Nicholson, the Assistant United States Attorney, and Mr. Reynolds is United States Marshal. Also to James R. Cooney, District Clerk, and to Billy Joe Wade.

MR. HOLCOMB: We offer this in evidence, Your Honor.

MR. NICHOLSON: Judge, we don't have any objec-
[fol. 59] tion to it. It's apparently a copy signed by the Court.

MR. HOLCOMB: It's the original, Your Honor.

THE COURT: All right.

REPORTER'S NOTE: An instrument was then handed to the jury.

MR. HOLCOMB: No further questions.

* * * *

[fol. 60]

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

MR. HOLCOMB: Your Honor, if it is appropriate at this time, we would like to make a motion for judgment of dismissal on the ground—

THE COURT: (interrupting) Judgment of acquittal.

MR. HOLCOMB: Judgment of acquittal—on the grounds that the identification testimony of the witnesses, Gray and Chambers, in regard to the identification of the

Defendant, Billy Joe Wade, was obtained in violation of the statutes and the Constitution of the United States, in that the attorney for the Defendant, who had been previously appointed, was not consulted nor present at the time of such action, and that such actions were not subject to nor done with or by the consent or advice of counsel appointed by the Court, and were in deprivation of his rights to due process and self-incrimination statutes and constitutional provisions; and move to strike the testimony of Mr. Albert and—not Mr. Albert—but to strike the testimony of Mr. Gray and Mrs. Chambers in regard to such identification.

MR. NICHOLSON: May it—

Your Honor, I might point out that the Government [fol. 61] did not even go into the line-up whatsoever on the direct examination of Mrs. Chambers; that that testimony was elicited by Counsel for the Defendant himself after the subject matter had been opened up for the jury before the subject was pursued by the witness, Mr. Gray.

THE COURT: Yes.

I am going to overrule the motion for judgment of acquittal and the motion to strike the testimony of the witnesses Gray and Chambers.

I will say this, though, that under the recent holding of the Court of Appeals for the Fifth Circuit, in the Clinton case, had the F.B.I. taken a statement from this witness—this man—at that time, after his attorney had been appointed without notifying his attorney, it would not be admissible in evidence.

* * * *

[fol. 62]

EXCERPTS FROM MR. HOLCOMB'S ARGUMENT TO THE JURY

But, for a period of seven months—or eight months—from September the 21st until May the 12th—Mrs. Chambers and Mr. Gray say they saw no one—identified no one in regard to the matter, and that on May the 12th they were called to Tyler for a line-up. Mrs. Gray—Mrs. Chambers was shown a picture; and then she says that she sees a man in the hall with Mr. Albert—not a group of prisoners, now, mind you—not a regular line-up—but

[fol. 63] there is the only prisoner—the only man with this Federal officer.

And, according to the testimony, at a later time several other people were brought down by another officer, or someone else, and then they had a line-up—and that they then put tape on them.

But, they first time they saw him, they were sitting in the courtroom, like these folks here (indicating) apparently, and here standing in the anteroom, or the hall, is Mr. Albert—a professional officer—a special agent of the F.B.I.—with this one prisoner—no hat on.

Mr. Wade didn't have a hat on. He was standing there in the hall with—with this officer.

So, we see, that's the only man with Mr. Albert.

Then Mr. Albert runs the line-up through there. He questions them—lines them up—got tape on their face—and he takes pictures and he questions them.

Is there any possibility—any reasonable possibility that Mr. Gray or Mrs. Chambers could have been honestly, though innocently, influenced by the association of this [fol. 64] Federal officer with that one prisoner—and the State brings out a bunch more?

Is it possible?

Isn't it reasonable?

Yes.

They identified him.

And, I'll say this: they sincerely believe what they said.

THE COURT: You have five minutes left, Mr. Holcomb.

MR. HOLCOMB: Thank you, Your Honor.

But, as we go a little further—

The case will be in your hands as soon as Mr. Nicholson gets up and replies.

But, in regard to this line-up—the line-up of May the 12th—sixteen or seventeen days after the man had been appointed a lawyer, according to the letter here was—that was introduced in evidence here—which shows that Mr. Nicholson was notified—Mr. Reynolds, the Marshal, was notified—Mr. Cooney was notified—and Mr. Wade the Defendant was notified.

So this man . . . . He was under arrest. He was taken to the courthouse under circumstances . . . . Not that it's [fol. 65] illegal. No one says it's illegal for such action to transpire. But, you are entitled to take such action and place it in the proper perspective as to how it was handled—that the man's lawyer was not there.

He knew he had a lawyer. His lawyer was not notified. So, there we are.

* * * *

[fol. 66]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS—TYLER DIVISION

No. 6805—Indictment—2 Counts

UNITED STATES OF AMERICA

v.

BILLY JOE WADE

JUDGMENT AND COMMITMENT—Aug. 30, 1965

On this 30th day of August, 1965 came the attorney for the government and the defendant appeared in person and [1] by counsel, Weldon G. Holcomb, Tyler, Texas, appointed by the Court.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] NOT GUILTY and a Jury Verdict of GUILTY of the offense of conspiracy to rob The First State Bank of Eustace, Texas, in violation of Title 18, U. S. C., Sec. 371, as charged in Count One; and robbery of said Bank by use of a dangerous weapon, in violation of Title 18, U. S. C., Section 2113(d), as charged in Count Two [3] in the INDICTMENT and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Five (5) years on Count One; Fourteen (14) years on Count Two; to run concurrently. Said defendant shall become eligible for parole at such time as the Board of Parole may determine.

* * * *

APPROVED

/s/ [Illegible]
A. U. S. A.

FILED
August 30, 1965
James R. Cooney, Clerk, U. S. Court
By /s/ Evelyn Walker
Deputy

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joe W. Sheehy
United States District Judge.

The Court recommends commitment to:[6]

.....
Clerk.

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 67]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22976

BILLY JOE WADE, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Texas.

OPINION—March 31, 1966

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

TUTTLE, Chief Judge: Billy Joe Wade was arrested in Houston, Texas, on the 2nd day of April, 1965. He had been indicted by a federal grand jury for the Eastern District of Texas, which charged that, along with Briggs and Pickett, he had conspired with them to rob, and had robbed, a federally insured bank at Eustace, Texas. It is apparent that the indictment was based entirely upon the testimony given by the alleged accomp-
[fol. 68] lices, who had been arrested and sentenced on another offense some time earlier.

The trial court appointed counsel on April 26, 1965, at which time Wade was in custody in the Smith County Texas Jail. Thereafter, without notice to counsel, on May 12th, the appellant was taken from his cell to the second floor of the courthouse. At that time, the president and cashier of the bank, the only persons who were present at the time of the robbery, were in the courtroom, where a lineup was to take place. They observed Wade in the hall outside the courtroom in the custody of an officer, and thereafter, following the assembly of five other persons, Wade was put in the lineup of six people. Each of the six

* Of the Second Circuit, sitting by designation.

men in the lineup had had some bandages affixed to his face in a manner which the witnesses had stated had been worn as a disguise by the person who had robbed the bank. The lineup was conducted by Special Agent Albert of the Federal Bureau of Investigation. The record discloses that while they were in the lineup, "Mr. Albert asked them some questions—to step forward and so forth."

The witnesses, Mr. Gray and Mrs. Chambers, indentified the appellant in the lineup as the individual who robbed the First State Bank of Eustace. Later, at the trial, both Briggs and Pickett testified as to their participation with Wade in the robbery and the identification was repeated by Mrs. Chambers and Mr. Gray. Wade was found guilty by the jury and sentenced by the trial court to serve five years on the first count and fourteen years on the second count, the sentences to run concurrently. [fol. 69] Although the record does not show exactly what oral statements were required to be made by Wade during the lineup, government counsel, in oral argument, commendably conceded that each of the persons in the lineup was required to repeat words something like, "Put the money in this bag," in order that the witnesses could hear similar words to compare with their recollection of the sound of the voice of the person who gave them such instructions at the time of the robbery.[1]

Appellant's attack on his conviction and sentence here is two-fold. He complains, first, that the manner in which he was brought to the attention of the principal non-accomplice witnesses against him for identification purposes, amounted to a requirement that he give evidence against himself in violation of the Fifth Amendment, and that, second, subjecting him to the lineup under the circumstances here stated, in the absence of his counsel, after the accusatory stage of the prosecution had commenced, deprived him of the right to counsel at a critical stage of

[1] We deem it appropriate to consider this fact as a part of the record on appeal because, were it not considered, then it would remain as a possible basis for the filing of a petition for post conviction review at a later date, if it is not disposed of on direct appeal at this time.

the proceedings in violation of the Sixth Amendment to the Constitution. He says that the later identification by the bank officials in open court was necessarily poisoned by their earlier identification of him conducted in the prejudicial manner outlined, and that, thus, it was error to receive the testimony of the two witnesses who identified in open court. Appellant relies on the cases of *Escobedo* v. *Illinois*, 378 U.S. 298; *Massiah* v. *United States*, 377 U.S. 201.

[fol. 70] Appellant concedes that the courts have repeatedly held that an ordinary lineup of an accused person with others for the purpose of having them viewed by victims of the alleged crime for purposes of identification does not run afoul of the self-incrimination provisions of the Fifth Amendment. Although no Supreme Court decision on this precise point has been cited nor found by us, there is the well-known dictum of Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245, where it is said that the prohibition of the Fifth Amendment "is a prohibition of the use of physical or moral compulsion to extort communications from him, not in exclusion of his body as evidence when it may be material."

The Court of Appeals for the Second Circuit, sitting en banc in the case of *United States ex rel Theodore R. Stovall* v. *Denno, Warden*, 2nd Cir. . . . . F.2d . . . ., (No. 307, Sept. Term, 1964, decided Jan 31, 1966), deals with this problem in extenso. We find no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him.

When, however, a lineup goes beyond these limits, such as, for instance, requiring him to act out part or all of the crime which it is charged that the perpetrator of the crime performed, we note a very strong caveat. As Judge Friendly of the Second Circuit pointed out in his prior opinion in *Stovall*, when it was first decided by a panel of three judges, (Unpublished opinion, No. 307, Sept. Term, 1964, decided Mar. 31, 1965,) the Holmes [fol. 71] opinion in the *Holt* case which said, "Moreover, we need not consider how far a court would go in com-

pelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent, *Adams* v. *New York*, 192 U.S. 585" was written before *Weeks* v. *United States*, 232 U.S. 383, which, for the first time proscribed the use in the Federal courts of illegally obtained evidence. Following *Weeks*, it does become important in a proper case to determine whether an order requiring that a man "exhibit himself" goes too far.

However, we need not resolve this issue in this case because we are persuaded of the correctness of the position taken by the dissenting judges in the *Stovall* case, when it was decided by the court en banc. There, Judges Friendly, Waterman and Smith found that a compulsory confrontation by an accused person charged in a capital case by taking him to the hospital of one of the victims of the violent crime for identification after his arrest, but before counsel had been appointed for him, violated the principles announced by the Supreme Court in *Massiah* v. *United States*, because, as the dissenting opinions of Judges Friendly and Waterman stated, "The State wishes to make use of him to obtain evidence that will have independent testimonial value."

Here, as was true without question in the *Stovall* case, there is no doubt that the criminal prosecution had commenced and that Wade was, at all times thereafter, entitled "to have the assistance of counsel for his defense." *Hamilton* v. *Alabama*, 368 U.S. 52; *White* v. *Maryland*, [fol. 72] 373 U.S. 359. It becomes necessary, therefore, only to determine here whether requiring Wade to submit to a lineup of the character that has been depicted above in the absence of counsel already assigned to him, deprived him of the aid of counsel at a critical stage of the prosecution. At this late date, it cannot be doubted that if Wade had made a confession, instead of being subjected to the lineup and being required to speak certain words formulated by the prosecution, a conviction based on such confession would be void. *Massiah* v. *United States*, 377 U.S. 201. Neither can there be any doubt that if counsel had been notified and had been present, he could have instructed his client, the appellant here,

to remain silent and not make the verbal responses required of him by the prosecutor. Counsel, if present, might also have been able to prevent the placing of the suspect in a place where he could be seen separately by the prospective prosecution witnesses before the lineup took place.

We think it clear that the conduct of the lineup under the circumstances here present, in the absence of counsel, was a violation of Wade's constitutional rights. There remains the question whether such violation was of such a nature as to require a finding that the lack of counsel was prejudicial to Wade.

The test whether error was harmless was last stated by the Supreme Court in *Fahy* v. *Connecticut*, 375 U.S. 85, where the court said, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 85, 86. In view of the fact that the identification of Wade by Mr. [fol. 73] Gray and Mrs. Chambers at the lineup was six months after the occurrence, and, in view of the fact that Wade was placed, even fleetingly, in a position where he was seen separately by the two prospective witnesses alone, before the lineup, and also because of the compulsory verbal responses made by Wade at the instance of the Special Agent, it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred. Further, when it is considered that the only other testimony by which Wade was identified with the crime was the testimony of his alleged accomplices, who admitted at trial to inconsistent statements, we would be naive, indeed, were we to hold that "There [was not] a reasonable possibility that the [violations] complained of might have contributed to the conviction." This being the test devised by the Supreme Court as being applicable in its review of a State court conviction, it must be assumed that, in a Federal court conviction, no less strict a standard applies. The dissenting opinion in *Fahy* v. *Connecticut*, notes this distinction. 375 U.S. 85, 92.

It appearing, therefore, that the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights,

and, it being plain that the error in not striking the testimony of the two witnesses which we find may well have been colored by the illegal procedure was prejudicial under these applicable legal standards, it follows that the judgment of conviction must be reversed and the case remanded for further proceedings. In the event of a new trial, the evidence of the two bank witnesses, following [fol. 74] the occurrence that we have held to have violated Wade's rights, must be omitted.

The judgment is REVERSED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion.

JONES, CIRCUIT JUDGE, DISSENTING

The effect of the determination of the majority will probably result in the discharge of two persons convicted of bank robbery. The decision of the majority is made, at least in part, on the basis of facts outside the record. These facts are considered, so it is said, in order to avoid having a post conviction proceeding instituted. I am not persuaded that this is any justification for considering on appeal something which was not in the record and not before the trial court. Post conviction remedies were intended to cover situations where the right to relief was not disclosed by the record. It follows from the opinion of the majority that it is improper for observers of a crime to see a person suspected or accused of the offense prior to trial. I had no notion that this was prohibited.

I do not think it has been previously held that putting a suspect or an accused in a line-up and treating him in the same manner as the others are treated is or may be a violation of a constitutional right.

I would follow the decisions cited by the majority rather than the dissenting views in those cases. Therefore I

DISSENT.

[fol. 75]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22976

D. C. Docket No. 6805-Criminal Action

BILLY JOE WADE, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Texas.

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

JONES, Circuit Judge, dissents.

March 31, 1966

*Of the Second Circuit,
sitting by designation.

Issued as Mandate: May 19 1966

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[File Endorsement Omitted]

[Title Omitted]

Appeal from the United States District Court
for the Eastern District of Texas

ORDER DENYING PETITION FOR REHEARING—
May 11, 1966

Before TUTTLE, Chief Judge, JONES and WATERMAN*, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

*Of the Second Circuit, Sitting by designation.

[fol. 77]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1965

UNITED STATES, PETITIONER

vs.

BILLY JOE WADE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 11th, 1966

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 15th
day of June, 1966

[fol. 78]

SUPREME COURT OF THE UNITED STATES

No. 334, October Term, 1966

UNITED STATES, PETITIONER

v.

BILLY JOE WADE

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 223.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 236452 343